United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7475

To Be Argued By:

L. KEVIN SHERIDAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

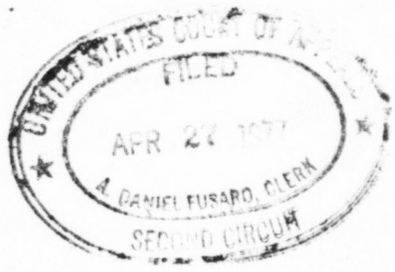
JOSEPHINA DUCHESNE, as Administratrix of the Estate of Pauline Perez, et al.,

Plaintiffs-Appellants,

-against-

JULE M. SUGARMAN, et al.

Defendants-Appellees



On appeal from the United States District Co t for the Southern District of New York

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BRIEF OF THE MUNICIPAL OFFICIAL APPELLEES

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Brief of the Municipal Official Appellees

Preliminary Statement

In this action brought pursuant to 42 U.S.C. §1983, the administratrix of the estate of the original plaintiff, Pauline Perez, challenges orders of the United States District Court for the Southern District of New York (METZNER, J.), entered April 26, and 28, 1976, which on the trial of this action, dismissed the complaint as to various of the defendants, including the municipal official defendants Sugarman, Beine and Fass. *

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* This case was before this Court once before. Perez v. Sugarman, 499 F. 2f 761 (2d Cir. 1974).

The gravamen of plaintiff's * complaint is that the defendants,through their agents or employees or subordinates, unlawfully withheld plaintiff's children from her. As against defendants Sugarman, Beine and Fass, plaintiff's theory of liability is that these defendants, who are not claimed to have any personal knowledge of plaintiff's situation, should be held personally liable to plaintiff, for money damages, based upon their alleged failure to adequately supervise the operation of the Bureau of Child Welfare ("BCW") of the New York City Department of Social Services (Brief, Point III, p. 45, et seq.)

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*Unless otherwise indicated,"plaintiff" refers to the original plaintiff, Pauline Perez, now deceased.

ARGUMENT

THE MUNICIPAL OFFICIAL DEFENDANTS HAD NO PERSONAL INVOLVEMENT IN OR KNOWLEDGE OF THE ACTIONS OF WHICH PLAINTIFF COMPLAINTS. NOR ON THIS RECORD IS THERE ANY BASIS PRESENTED FOR HOLDING SUCH DEFENDANTS LIABLE TO PLAINTIFF ON A THEORY OF CONSTRUCTIVE KNOWLEDGE.

In Point III of plaintiff's brief in this Court primary reliance is placed on two decisions of this Court, Wright v. McMannn, 460 F. 2d 126 (1972), cert. denied, 409 U.S. 885, and United States ex rel. Larkins v. Oswald, 510 F. 2d 583 (1975), in both of which cases arguments of prison officials of lack of knowledge of the conditions complained of by the plaintiff prisoners were rejected. Plaintiff is forced to such reliance because the District Court here held that there was no evidence that the City defendants Beine , Fass and Sugarman had any knowledge of plaintiff Perez or her children, either personal or constructive (Appendix, Statement of Evidence, pp. 33-34 ; see, also, id. p. 35). Such knowledge was denied at trial by Beine and Fass (id. pp. 6 and 9), and by the defendant Sugarman in his answer (see Answer of defendant Sugarman pars. "SEVENTH", "EIGHTH" and "ELEVENTH").

We submit that there are present here none of the unusual factors which in Wright v. McMann and Larkin induced this Court to reject arguments of lack of knowledge

and that instead the rule that should be applied to these defendants is that they may not be held vicariously liable in this §1983 action for the acts of others on a respondant superior theory. See Arroyo v. Schaefer , 548 F. 2d 47, 51 (2d Cir., 1977), citing Williams v. Vincent, 508 F. 2d 541 (2d Cir., 1974), and Johnson v. Glick, 481 F. 2d 1028 (2d Cir., 1972), cert. denied, 414 U.S. 1033. Moreover, we would suggest that, whatever the correctness of Wright v. McMann and Larkin on their particular facts, in light of decisions such as Scheuer v. Rhodes, 416 U.S. 232 (1974), and Wood v. Strickland,420 U.S. 308 (1975), both explicating the scope of the doctrine of "official immunity" for good faith acts, both Wright v. McMann and Larkin must be read far more narrowly than plaintiff reads them. For, while both Scheur v. Rhodes and Wood v. Strickland rejected claims of aboslute immunity, both cases appear clearly to require that the official sought to be held liable must have had at least knowledge of the events claimed to have caused injury. Thus, in both the test of liability turns on a standard of what is reasonable "in light of all the circumstances" (416 U.S. at 247-248; 420 U.S. at 319), presumably as those circumstances were known to the actor.

In the case at bar there is not a shred of evidence that any of the City official defendants countenanced in any way any pattern of abuse of official authority with respect to the withholding of children from their parents such that it might be fair to impose upon them liability for the acts of others in withholding plaintiff's children from her. Quite to the contrary, defendant Beine testified, without contradiction, that the primary goal of BCW is to maintain families and when placement occurs to plan for the reunification of the family at the earliest possible opportunity. (Statement of Evidence, p. 4). And she testified that the long-term placement of these particular children without written consent of their mother or court order was the first case of such kind ever brought to her attention. (id., pp. 6-7).

Clearly, all that this record reveals as to these defendants is that they themselves took no actions with respect to plaintiff or her children, had no knowledge of plaintiff or her children and were not on notice as to any wrongful acts done by others. All that this record reveals as to these defendants is that they are public servants who, quite understandably, lacked sufficient prescience to foresee every possibility for abuse of official authority by others. This is not, we believe, sufficient to sustain an award of damages against them

under §1983. To allow a verdict for plaintiffs against these defendants on this state of the evidence "would amount of a miscarriage of justice." Arroyo v. Schaefer, supra, 548 F. 2d at 51.

CONCLUSION

At least insofar as the City official defendants are concerned, the orders appealed from should be affirmed.

April 26, 1977

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel
Attorney for the
Municipal Official Appellees.

L. KEVIN SHERIDAN,

of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

JAMES BURNS *being duly sworn, says that on the* 26 *day of* April, 1977 *, he served the annexed* Brief *upon* Frederick J. Magovern *Esq., the attorney for the* Opposing att'y *herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No.* 102 East 35th St. *in the Borough of* Manh *, City of New York, being the address within the State theretofore designated by him for that purpose.*

Sworn to before me, this 26 *day of* April 1977

SHARON L. FEIGENBAUM
Commissioner of Deeds
City of New York No. 2-2762
Certificate Filed in New York County
Commission Expires August 1, 1979

Sharon L. Feigenbaum

James Burns

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STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

KEVIN SCHERZINGER

being duly sworn, says that on the 26 day of APRIL 1977

at No. 24 West 77th St in the Borough of Manhattan in New York City, he served a copy

of the annexed Brief of the Municipal Legal Services upon Lisa H. Blatman Esq.,

the Attorney for the Opposing Attorney. in the within entitled action, by delivering

a copy of the same to a person in charge of said Attorney's office, and leaving the same with him.

Sworn to before me, this 26th
day of APRIL 1977

JAMES BURNS
Commissioner of Deeds
City of New York - No. 4-1787
Commission Expires May 1, 1978

Kevin B Scherzinger

James Burns

Form 320-3M-123057(61)

AFFIDAVIT OF SERVICE ON ~~ATTORNEY~~ BY MAIL

State of New York, County of New York, ss.:

JAMES BURNS being duly sworn, says that on the 26 day of April, 1977, he served the annexed Brief upon James M. Runcie Esq., the ~~attorney~~ for the Respondent herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said ~~attorney~~ at No. 71-16 67th Ave. Queens Village the Borough of Queens, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this
26 day of April 1977

SHARON L. FEIGENBAUM
Commissioner of Deeds
City of New York No. 2-2782
Certificate Filed in New York County
Commission Expires August 1, 1979

James Burns

Sharon L. Feigenbaum

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